STATE OF MICHIGAN

COURT OF APPEALS

CHARLES DIXON,

Plaintiff-Appellant,

v

HUDSONVILLE TRUCK AND TRAILER SERVICE CO.,

Defendant,

and

BORCULO GARAGE, d/b/a GRASSMID TRANSPORT,

Defendant-Appellee,

and

STOUGHTON TRAILERS, INC, and HENDRICKSON USA, LLC,

Defendants.

UNPUBLISHED
May 3, 2011

No. 296948
Kent Circuit Court
LC No. 07-08338-NP

Before: SHAPIRO, P.J., and FITZGERALD and BORRELLO, JJ.

PER CURIAM.

In this worker's compensation claim, plaintiff appeals as of right from the trial court's grant of summary disposition to defendant Borculo Garage d/b/a Grassmid Transport ("Grassmid") on the grounds that plaintiff's negligence claim against it was barred by the exclusive remedy provision of the Worker's Disability Compensation Act (WDCA) because, under the economic realities test, Grassmid was a co-employer of Dixon at the time of his injury. We affirm.

On appeal, plaintiff asserts that Grassmid cannot be considered his employer for two related reasons: 1) Grassmid did not comply with MCR 418.611(1); and 2) there can only be one employer under the language of the statute.

Plaintiff first claims that Grassmid did not comply with MCL 418.611, which requires "[e]ach employer under the act" to "secure the payment of compensation under this act" by either "receiving authorization from the director to be a self-insurer," or by "insuring against liability" with an authorized insurer. Here, Grassmid insured against liability through its service agreement with PLC. Section 2.4 of that agreement states,

> PLC shall obtain and pay the costs of providing workers' compensation insurance and shall mange workers' compensation claims. PLC shall furnish to Customer a certificate of insurance evidencing the issuance to PLC of policies providing such coverage. PLC and Customer shall be co-employers of Assigned Employees for purposes of the exclusive remedy provisions of workers' compensation laws. PLC hereby agrees to indemnify and hold Customer harmless from and against all workers' compensation claims brought against Customer by any Assigned Employee(s).

PLC did, in fact, obtain such insurance and plaintiff is receiving workers' compensation benefits under it. Thus, to the extent that a contractual obligation requiring a third-party to obtain such coverage is sufficient to satisfy the statutory obligation, Grassmid complied with the statute. See *Kidder v Miller-Davis Co*, 455 Mich 25, 40; 564 NW2d 872 (1997).

Nevertheless, we recognize that plaintiff's argument in this regard is correlative to its argument that the use of the word "the" in the exclusive remedy provision means there can only be one employer. At the summary disposition motion hearing, the trial court addressed plaintiff's argument: "So counsel, you're arguing that if there are co-employers, then both employers must, under the law, have workers compensation insurance on the same employee." Plaintiff responded, "No, I'm not arguing that, because I don't think the act evinces any room for co-employers in this situation, because of the word 'the'. I understand the Court's position with respect to it, but that is not consistent with the position of the plaintiff." Thus, plaintiff argues that, because there can only be one employer, Grassmid cannot be that employer because it has neither bought insurance nor secured permission to be a self-insurer as required under the statute.

Plaintiff makes a compelling textual argument that the language of the exclusive remedy provision in MCL 418.131(1) cannot apply to prevent suit against Grassmid. MCL 418.131(1) provides, in relevant part, "The right to the recovery of benefits as provided in this act shall be the employee's exclusive remedy against *the* employer for a personal injury or occupational disease" (emphasis added). As our Supreme Court noted in *Robinson v City of Detroit*, 462 Mich 439, 461; 613 NW2d 307 (2000), the law recognizes a difference between the articles "a" and "the," with "a" being indefinite and "the" being definite. Under such an approach to statutory interpretation, the Legislature's choice of the definite article "the" evinces an intent that there is only one employer entitled to immunity from suit. *Id.* at 458-459, 461-462. Here, there is no question that plaintiff was employed by PLC, who leased him out to Grassmid at the time of the accident. Consequently, PLC would be "the" employer for the purpose of MCL 418.131(1), and plaintiff could maintain his suit against Grassmid.

Defendants argue that plaintiff's interpretation of MCL 418.131 is contrary to the legislative purpose behind the WDCA and point to *Kidder v Miller-Davis Co*, 455 Mich at 40-41 and *Farrell v Dearborn Mfg Co*, 416 Mich 267; 330 NW2d 397 (1982) in support of their

position. In *Farrell* our Supreme Court held "that the exclusive remedy available to the employee in a labor broker situation is provided by the workers' compensation statute and that a separate tort action against the customer of the labor broker may not be maintained." *Id.* at 278. In *Kidder*, our Supreme Court noted that *Farrell* "stop[ped] short of holding that a labor broker-customer relationship will always establish dual employer status as a matter of law" and that the inquiry still must consider the factors in the economic realities test. 455 Mich at 40 n 7. Here, the trial court considered the factors under the economic realities test and determined that a co-employer situation existed, similar to that found in *Kidder*.

We agree with defendants that their interpretation is more consistent with the purpose behind the WCDA. Indeed, the *Farrell* Court explicitly considered such an argument in reaching its conclusion, noting that "[t]o conclude that an individual so employed [by a labor broker] is outside the scope of the exclusive remedy provision would clearly disregard the overall objectives of the statutory scheme." *Farrell*, 416 Mich at 277. Nevertheless, the language in *Robinson* is particularly emphatic that it is the language selected by the Legislature, not the underlying objectives of the statute, that must guide statutory interpretation. See *Robinson*, 462 Mich at 459-460 ("This approach can best be described as a judicial theory of legislative befuddlement. Stripped to its essence, it is an endeavor by the Court to use the statute's "history" to contradict the statute's clear terms."). Indeed, under *Robinson*, it is this Court's "*duty* [] to give meaning to the Legislature's choice of one word over the other" (emphasis added). *Id.* at 461. We are mindful that *Robinson* was not a WCDA case. Even so, we find it difficult to reconcile our duty under *Robinson* with the binding precedent in *Farrell* and *Kidder*.

Ultimately, we find ourselves compelled to conclude that, even though *Farrell* and *Kidder* were both decided prior to *Robinson*, and neither of them considers the impact of the Legislature's choice of the definite article "the" in making its determination, we are bound by these exclusive remedy cases unless and until our Supreme Court elects to reconsider this issue. Therefore, even though we agree that, under the plain language of MCL 418.611, there can be only one employer entitled to the exclusive remedy provision, caselaw that predates *Robinson* requires us to conclude that the trial court properly determined that plaintiff could not maintain suit against either PLC or Grassmid.

Affirmed.[1]

/s/ Douglas B. Shapiro
/s/ E. Thomas Fitzgerald
/s/ Stephen L. Borrello

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[1] In light of our decision to affirm, we need not discuss whether this Court's previous order requires application of the law of the case doctrine.